Devi Meyyammai a/p M Ramanathan & Anor v Hartini bt Mohamad & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)-708 OF 2011
ABU SAMAH, AZAHAR MOHAMED AND AZIAH ALI JJCA
25 FEBRUARY 2013

Land Law — Restraint on dealings — Caveat — Application for extension of caveat pending disposal of suit — Application dismissed — Appeal — Whether appellants had caveatable interest in property — Whether High Court judge erred in exercise of her discretion — Whether appellants' claim frivolous and vexatious — Whether there were serious questions to be tried — Whether on balance of convenience caveat should be extended until disposal of main action

The appellants had entered into a sale and purchase agreement ('the SPA') to purchase the first respondent's property situated in Bandar Petaling Jaya ('the property') at the purchase price of RM200,000. At the material time the property was charged to Affin Bank Bhd ('the bank'), and it was a term of the SPA that the appellants would pay the deposit sum of RM20,000 and an additional sum of RM20,000, being part payment of the purchase price, to the bank. As agreed, upon the execution of the SPA the appellants forwarded a sum of RM50,000 to the bank. The SPA also provided that the sale and purchase of the property, which was subject to a restriction in interest, was conditional upon the first respondent obtaining the prior consent of the state authority to transfer the property to the appellants. However, about a week after the execution of the SPA, the first respondent rescinded the SPA and undertook to refund the appellants the monies which they had paid to the bank. The appellants lodged a private caveat and gave notice of their intention to proceed with the completion of the sale and purchase of the property. When the first respondent applied for removal of the appellants' caveat, the latter filed a suit against the first respondent for specific performance of the SPA and/or general damages to be assessed. The appellants also applied for an extension of the caveat pending disposal of the suit they had filed. The High Court judge found that based on the existence of the restriction in interest and the absence of evidence that the consent from the state authority had been applied for the appellants had no caveatable interest in the property. Consequently, the High Court dismissed the appellants' application to maintain the caveat. This was the appellants' appeal against that decision. The appellants claimed that shortly after the dismissal of the appellants' application for an extension of the caveat, the first respondent had sold the property to the second respondent. The

second respondent, a bona fide purchaser, claimed protection under s 340 of the National Land Code ('NLC') and opposed the appellants' appeal.

Held, allowing the appeal with costs of RM10,000 against the first respondent.

(1) In the present appeal the High Court judge had followed the decision in *Goo Hee Sing v Will Raja & Anor* [1993] 3 MLJ 610 (*Goo Hee Sing*'s case) to find that the appellants had no caveatable interest in the property. However, on the facts this appeal was distinguishable from *Goo Hee Sing*'s case and the High Court judge had not sufficiently considered the factual matrix of this case when she concluded that the appellants had no caveatable interest in the property. The facts showed that the first respondent had rescinded the SPA about a week after its execution. By rescinding the SPA, the first respondent had no intention of carrying out her obligation to apply for consent from the state authority and the appellants had been denied the opportunity of her assistance to obtain such consent. Hence, in the circumstances production of evidence that consent had been applied for had been rendered impossible (see para 8).

(2) In the present appeal the appellants had stated that they had the right to lodge the caveat by virtue of the SPA. It was an undisputed fact that there was a concluded contract between the appellants and the first respondent, and that the appellants had performed their contractual obligations by tendering monies to the bank. Based on the evidence and the authorities cited it was clear that as at the date of entry of the caveat, the appellants had obtained an interest of a contractual nature in the property, which was sufficient to make it a caveatable interest and to support a caveat (see paras 10–11).

(3) It is well settled that the onus was on the second respondent, whose title was subsequent to the contract between the first respondent and the appellants, to prove that he was a bona fide purchaser for value without notice. It was premature to determine at this stage whether the rights of the appellants arising from their contractual agreement with the first respondent ought to prevail over the subsequent dealing between the first and second respondent. However, it was clear based on the factual matrix that the appellants' claim was not frivolous and vexatious and that there were serious questions to be tried (see para 12).

(4) Notwithstanding the subsequent purchase of the property by the second respondent, the balance of convenience did merit the caveat being allowed to remain to prevent further dealing in the property pending determination of the dispute between the parties (see para 13).

[Bahasa Malaysia summary

Perayu-perayu telah menandatangani perjanjian jual beli ('PJB') untuk membeli hartanah responden pertama yang terletak di Bandar Petaling Jaya

('hartanah tersebut') pada harga belian sebanyak RM200,000. Ketika itu, harta tersebut dicagarkan kepada Affin Bank Bhd ('bank tersebut'), dan adalah menjadi terma PJB bahawa perayu-perayu akan membayar jumlah deposit sebanyak RM20,000 dan jumlah tambahan RM20,000 sebagai sebahagian daripada jumlah harga belian, kepada bank. Seperti yang dipersetujui, apabila PJB dilaksanakan, perayu membayar sejumlah RM50,000 kepada pihak bank. PJB ini juga memperuntukkan bahawa jual beli hartanah tersebut, yang tertakluk kepada sekatan kepentingan, adalah tertakluk kepada responden pertama untuk mendapatkan kebenaran terlebih dahulu daripada pihak berkuasa negeri untuk memindah milikan hartanah tersebut kepada perayu-perayu. Walau bagaimanapun, kira-kira seminggu selepas pelaksanaan PJB, responden pertama membatalkan PJB dan berjanji untuk membayar balik perayu-perayu wang yang telah dibayar kepada bank. Perayu-perayu memasukkan kaveat persendirian dan memberikan notis menyatakan hasrat mereka untuk meneruskan penyelesaian jual beli hartanah tersebut. Apabila responden pertama memohon bagi pembatalan kaveat perayu, perayu telah memfailkan saman terhadap responden pertama bagi pelaksanaan spesifik PJB dan/atau ganti rugi am yang akan ditaksir. Perayu-perayu juga memohon lanjutan kaveat sambil menunggu pelupusan yang telah difailkan. Hakim Mahkamah Tinggi mendapati bahawa berdasarkan kewujudan sekatan kepentingan dan ketiadaan keterangan bahawa persetujuan daripada pihak berkuasa negeri telah dipohon untuk perayu-perayu tidak mempunyai kepentingan boleh kaveat dalam hartanah tersebut. Sehubungan itu, Mahkamah Tinggi menolak permohonan perayu untuk mengekalkan kaveat. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu menghujahkan bahawa tidak lama selepas penolakan permohonan perayu untuk melanjutkan kaveat, responden pertama telah menjual hartanah tersebut kepada responden kedua. Responden kedua, seorang pembeli bona fide, berlindung di bawah s 340 Kanun Tanah Negara ('KTN') dan menentang rayuan perayu.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000 terhadap responden pertama.

(1) Dalam rayuan ini, hakim Mahkamah Tinggi telah mengikut keputusan dalam kes *Goo Hee Sing v Will Raja & Anor* [1993] 3 MLJ 610 ('kes *Goo Hee Sing*') dalam memutuskan bahawa perayu-perayu tidak mempunyai kepentingan boleh kaveat dalam hartanah tersebut. Walau bagaimanapun, berdasarkan fakta, rayuan ini dibezakan daripada kes *Goo Hee Sing* dan hakim Mahkamah Tinggi telah tidak mempertimbangkan matriks fakta dengan secukupnya apabila beliau memutuskan bahawa perayu tidak mempunyai kepentingan boleh kaveat dalam hartanah tersebut. Fakta-fakta menunjukkan bahawa responden pertama telah membatalkan PJB kira-kira seminggu selepas pelaksanaannya. Dengan membatalkan PJB, responden pertama tidak mempunyai niat untuk menjalankan kewajipannya untuk memohon kebenaran daripada pihak

berkuasa negeri dan perayu-perayu telah dinafikan peluang untuk bantuannya untuk mendapatkan kebenaran tersebut. Oleh itu, dalam hal sedemikian, pengemukaan keterangan bahawa persetujuan telah diberikan adalah dianggap mustahil (lihat perenggan 8).

(2) Dalam rayuan ini, perayu-perayu telah menyatakan bahawa mereka mempunyai hak untuk memasukkan kaveat tersebut menurut PJB. Adalah fakta yang tidak dipertikaikan bahawa terdapat kontrak di antara perayu-perayu dan responden pertama, dan bahawa perayu-perayu telah melaksanakan kewajipan kontrak mereka dengan memberikan wang kepada bank. Berdasarkan kepada keterangan dan pihak berkuasa telah menyatakan secara jelas bahawa pada tarikh kemasukan kaveat, perayu-perayu telah memperolehi kepentingan yang bersifat kontrak dalam hartanah, yang cukup untuk menjadikannya kepentingan boleh kaveat dan menyokong kaveat tersebut (lihat perenggan 10–11).

(3) Adalah matan bahawa tanggungjawab terletak pada responden kedua, yang mana hak miliknya didapati selepas kontrak antara responden pertama dan perayu-perayu, untuk membuktikan bahawa dia adalah seorang pembeli bona fide dengan nilai tanpa notis. Adalah masih terlalu awal untuk menentukan pada peringkat ini sama ada hak-hak perayu yang timbul daripada perjanjian kontrak mereka dengan responden pertama harus mengatasi urusan seterusnya antara responden pertama dan kedua. Walau bagaimanapun, adalah jelas berdasarkan matriks fakta bahawa tuntutan perayu-perayu tidak remeh dan menyusahkan dan bahawa terdapat persoalan serius untuk dibicarakan (lihat perenggan 12).

(4) Tanpa mengambil kira pembelian hartanah berikutnya oleh responden kedua, imbangan kesenangan mewajarkan kaveat dibenarkan kekal untuk mengelakkan lagi urusan hartanah sementara menunggu penentuan pertikaian antara pihak-pihak (lihat perenggan 13).]

Notes

For cases on caveats, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reisue) paras 4120–4518.

Cases referred to

Bachan Singh v Mahinder Kaur & Ors [1956] 1 MLJ 97; [1956] 1 LNS 14 (refd)

Chin Cheng Hong v Hameed & Ors [1954] 1 MLJ 169; [1954] 1 LNS 7, CA (refd)

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212; [1979] 1 LNS 18, PC (refd)

Goo Hee Sing v Will Raja Perumal & Anor [1993] 3 MLJ 610; [1994] 1 CLJ 255, HC (distd)

Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263; [1992] 1 CLJ 150 (Rep); [1992] 1 CLJ 20, SC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (refd)

Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53; [1976] 1 LNS 67, FC (refd)

Mahadevan & Anor v Patel [1975] 2 MLJ 207; [1975] 1 LNS 95, FC (refd)

Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782; [1995] 2 CLJ 545, CA (refd)

Ong Chat Pang & Anor v Valiappa Chettiar [1971] 1 MLJ 224; [1971] 1 LNS 96, FC (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465; [1998] 1 CLJ 793, FC (refd)

Score Options Sdn Bhd v Mexaland Development Sdn Bhd [2012] 6 MLJ 475; [2012] 7 CLJ 802, FC (refd)

Vellasamy Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN 35553, Lot 9108 Mukim Hutan Melintang, Hilir Perak) v Gurbachan Singh Bagawan Singh & Ors [2010] 5 MLJ 437; [2012] 2 CLJ 712, CA (refd)

Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113 ; [1984] 1 CLJ 441 (Rep); [1984] 2 CLJ 2, FC (refd)

Legislation referred to

National Land Code ss 323(1), 323(1)(a), (b), (c), 326(1B), 340, Forms 19B, 19C

Appeal from: Suit No 22–1549 of 2010 (High Court, Shah Alam)

T Gunaseelan (Gunaseelan & Associates) for the appellant.
Moses Susayan (Raja Badrol, Ramli & Azizi) for the first respondent.
Sri Dev Nair (Sri Dev & Naila) for the second respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned judge of the Shah Alam High Court dismissing the application made by the appellants under s 326(1B) of the National Land Code ('NLC') vide summons in chambers (encl 3) for an order that the private caveat lodged by the appellants on property known as HS(D) 13449, PT3, Seksyen 14, Bandar Petaling Jaya, Daerah Petaling, Selangor ('the property') be extended pending the determination of the suit for specific performance filed by the appellants against the first respondent. The said property is subject to a restriction in interest which reads as follows:

Tanah yang diberi milik ini tidak boleh dipindah milik, dipajak atau digadai melainkan dengan kebenaran Pihak Berkuasa Negeri.

The learned High Court judge found that there is no evidence to show that the state authority had given its consent. Following the decision of Mahadev Shankar J (as he then was) in the case of *Goo Hee Sing v Will Raja Perumal & Anor* [1993] 3 MLJ 610; [1994] 1 CLJ 255, the learned judge held that the appellants have no caveatable interest in the property and on that ground dismissed the appellant's application.

[2] The appellants, being dissatisfied with the decision of the learned judge, appealed to this court. We heard the appellants' appeal and allowed the appeal and set aside the order of the High Court thus restoring the appellants' caveat pending determination of their suit against the first respondent.

[3] The salient background facts are as follows. The first respondent was the registered owner of the property. The appellants as purchasers had entered into a sale and purchase agreement dated 8 October 2010 ('SPA') with the first respondent in respect of the property at the purchase price of RM200,000. At the material time the property was charged to Affin Bank Bhd ('Affin'). Clause 2.1.1 provides that RM20,000 being the deposit was to be paid upon execution of the SPA whilst cl 2.1.2 provides that the deposit together with an additional RM20,000 being part payment of the purchase price are to be paid to Affin. On the execution of the SPA and with the first respondent's consent, the appellants forwarded a total sum of RM50,000 to Affin.

[4] Clause 1.2 of the SPA provides that the sale and purchase of the property is conditional upon the first respondent, at her own cost and expense, obtaining prior consent of the state authority to transfer the property to the appellants. Clause 1.3 provides that immediately upon execution of the SPA, both the first respondent and the appellants shall take all necessary steps to apply for consent and to do all things and acts as may be necessary or required to obtain the same. The consent was to be obtained within six months from the date of the SPA and in the event such consent was not obtained within the said period, the parties may in writing agree to extend the period. Clause 2.1.3 provides that the balance purchase price of RM160,000 is to be paid within 90 days from the completion date ie the date on which the appellants' solicitors receive the consent of the state authority (cl 1.5). The SPA also provides that if despite efforts made by the parties such consent was still not obtained then the SPA shall terminate and the RM40,000 shall be refunded to the appellants.

[5] Approximately one week after the execution of the SPA, by a letter dated 14 October 2010 issued through her solicitors the first respondent gave notice to the appellants of her intention to rescind the SPA. The three relevant reasons

given for the termination are in essence as follows (pp 140–141 of the appeal record):

(a) that the first respondent intended to rescind the sale and purchase agreement since she has been duly advised by her family members not to proceed with the sale of the property to any third party;

(b) that the first respondent was under tremendous pressure and was not in the right frame of mind when she signed the sale and purchase agreement since the property was subject to an auction on 12 October 2010; and

(c) that Affin has issued a debt work out letter dated 13 October 2010 instructing the first respondent to sign their offer for settlement of her outstanding loan with them at RM200,000 within seven days from the date of the letter failing which the offer shall lapsed and the bank shall pursue to claim the actual outstanding as at 30 September 2010 at RM371,333.22 and she has been informed by the bank that they shall forfeit the sum of RM50,000 earlier paid to the bank.

In the same letter the first respondent undertook to refund to the appellants the monies which the appellants had paid to Affin and upon the appellants' receipt of the monies neither party shall have any claim against each other in respect of the transaction. On the same date the appellants lodged the private caveat. By letter dated 15 October 2010 the appellants gave notice to the first respondent's solicitors amongst others that the appellants intended to proceed with the completion of the sale and purchase and of their intention to seek the remedy of specific performance under cl 6.2 of the SPA in the event the first respondent did not proceed with the transaction. The appellants then received Form 19C dated 3 November 2010 giving notice that the first respondent had applied for removal of the appellants' caveat. On 6 December 2010 the appellants filed a suit against the first respondent for specific performance of the SPA and/or alternatively for general damages to be assessed and applied to the court vide encl 3 for extension of the said caveat pending disposal of the suit filed by the appellants.

[6] According to the appellants' counsel shortly after the dismissal of the appellants' application, the first respondent sold the property to the second respondent who then settled all monies due to Affin and upon obtaining consent to transfer from the state authority, is now the registered owner of the property. The second respondent was brought in as a party in this appeal vide an ex-parte order of this court dated 15 February 2012. Before us the second respondent opposed this appeal and claims, as bona fide purchaser, the protection under s 340 of the National Land Code ('NLC').

[7] A caveator must first satisfy the court that he has a 'caveatable interest' in the land (*Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 ; [1984] 1 CLJ 441 (Rep); [1984] 2 CLJ 2). Under the NLC, whether or not a

person or body has any caveatable interest must be determined with reference to s 323(1)(a), (b) or (c) (*Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 6 MLJ 475; [2012] 7 CLJ 802). Section 323(1) provides as follows:

Applications for entry of private caveats.

(1) The persons and bodies at whose instance a private caveat may be entered are:

(a) any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520 Gopal Sri Ram JCA (as he then was) discussed what is meant by caveatable interest as distinguished from other interest in land. His Lordship said, inter alia:

> The parameters of caveatability under s 323(1)(a) are therefore circumscribed by these words: 'title' and 'registrable interest'. It is only one who makes a claim to either of these in land may enter a private caveat.

In respect of caveatable interest His Lordship said:

> It is our considered view, therefore, that based on the provisions of the NLC and the authorities cited above, the only parties who are authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land. Those parties may either have a claim to the title to the land or a claim to a registrable interest in the land or a claim to any right to such title or registrable interest
>
> Emphasis should be given to the words 'registrable interest' in s 323(1)(a) of the NLC. To be caveatable, the interest must be an interest in the land and that interest must be capable of registration. In short, it must represent a transaction that can ultimately lead to its registration on the register.

[8] In the present appeal the learned judge followed *Goo Hee Sing* and dismissed the appellants' application based on the existence of the restriction in interest and the absence of evidence that consent from the state authority had been applied for. However we note that in *Goo Hee Sing* Mahadev Shankar J raised issues regarding the sale and purchase transaction. In that case the plaintiff filed his suit for specific performance on 29 September 1992 which was approximately four years after the deed of sale was executed. However even four years after the execution of the deed there was no evidence before the court that consent had ever been applied for. Shankar J said that the plaintiff should

have been able to claim title to the said land, or a right to such title by virtue of the deed of sale. Alternatively he should be a person who could validly claim a right to such title. His Lordship stated that because the applicant was not able to demonstrate that an application for approval had already been made and that the state authority was bound to grant that approval as a matter of course within a reasonable period of time, he was impelled to the conclusion that a prospective purchaser, charge, or lessee of such land can have no caveatable interest in such land until the consent of the state authority has first been irrevocably obtained. Consequently His Lordship dismissed the application to maintain the caveat 'until the grey areas surrounding the circumstances of the granting or withholding of consent to deal with land subject to such restrictions in interest are clarified'. We are of the view that on the facts, this appeal is distinguishable from *Goo Hee Sing*. We find that the learned judge in following *Goo Hee Sing* has not sufficiently considered the factual matrix of this case when Her Ladyship concluded that the appellants herein have no caveatable interest in the property.

In her brief grounds of judgment Her Ladyship stated 'Di dalam kes ini, tidak ada langsung bukti yang menunjukkan bahawa persetujuan pihak berkuasa negeri telah diperolehi atau dipohon'. However the facts in the present appeal show that the first respondent had rescinded the SPA approximately one week after its execution. It is apparent that by rescinding the SPA, the first respondent had no intention of carrying out her obligation under cl 1.2 to apply for consent from the state authority and the appellants had been denied the opportunity to assist her to obtain such consent. Hence in the circumstances production of evidence that consent had been applied for had been rendered impossible.

[9] Any claim of a right to lodge a caveat must be minutely inquired into in order to decide whether the caveat should remain or be removed (*Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263; [1992] 1 CLJ 150 (Rep); [1992] 1 CLJ 20). An application to lodge a private caveat must contain an assertion by the purchaser that there is a concluded contract for the sale and purchase of the land because there can be no claim to the title to registered land until and unless a purchaser has an enforceable contract for such sale. In *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782; [1995] 2 CLJ 545 the Court of Appeal found that the respondent had not made any assertion in his application that there was a concluded contract for the purchase and sale of the subject land. Gopal Sri Ram JCA (as he then was) said:

> The grounds that the respondent asserted in his application in order to lay claim to the title to the land are: (1) That he paid an earnest deposit of RM2,000; (2) That he had discussions and meetings with Adaikappan on the terms and conditions of the sale and purchase agreement; (3) That Adaikappan had not responded to letters written by the respondent and his solicitor for the preparation of the sale and

purchase agreement; and (4) That the caveat is being entered pending the execution of that agreement and the transfer of the property to him.

Now, it is clear that nowhere in the application is there an assertion of a concluded contract for the sale and purchase of the land in question. In the absence of such an assertion it cannot be said that the respondent has a claim to the title to the land.

Until and unless a purchaser has an enforceable contract for the sale of land, he can lay no claim to the title to registered land. A fortiori, he has no interest that is capable of protection by the entry of a caveat. As we have said, the application for the entry of the caveat in the instant case contains no assertion of a concluded contract.

[10] In the present appeal we find that nowhere in the learned judge's grounds of judgment did Her Ladyship refer to Form 19B. In the appellants' application in Form 19B it is stated that they have the right to lodge the caveat by virtue of the SPA (p 145 of the appeal record). The fact that there was a concluded contract between the appellants and the first respondent is not in issue. It is also not disputed that the appellants have performed their contractual obligations by tendering monies to Affin which amounted to part performance of the SPA. In *Bachan Singh v Mahinder Kaur & Ors* [1956] 1 MLJ 97; [1956] 1 LNS 14 Thomson J said, inter alia, as follows:

Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right ad rem which is also a right in personam. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code. Nevertheless, the point is that when that contract was made the purchasers acquired a right ad rem and in personam to the land which so far as the vendor was concerned they were entitled to have erected into a real right. I am not prepared to say that that amounted to an equitable right. I prefer to regard it as a legal right of the nature of a chose in action.

In *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53; [1976] 1 LNS 67 Raja Azlan Shah FJ (as His Highness then was) said:

In my view, *the respondent had a contractual right under a contract of dealing in land which is a right of action against the vendor personally. That is a caveatable interest.* There is statutory support for this view vide s 323(1)(a) of the National Land Code which appears wide enough to include any person claiming any right to title or interest in land. (Emphasis added.)

Buhagiar J said in *Chin Cheng Hong v Hameed & Ors* [1954] 1 MLJ 169; [1954] 1 LNS 7:

This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the register; *the claim to an interest in land arising out of the contract is sufficient to make it a caveatable interest and to support a caveat* (*In re Registration of Caveat* [1908] Innes 114). The whole system of

> caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in land, but a caveat, being in the nature of a statutory injunction, does not in itself make a claim or right either better or worse. (Emphasis added)

In *Mahadevan & Anor v Patel* [1975] 2 MLJ 207; [1975] 1 LNS 95 the late Suffian LP dealt with s 323(1)(a) of the National Land Code and observed as follows:

> … and as the principle is that it is not only a person who has a right to a registrable interest in land that may enter a caveat against the land, but it is *any person claiming title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest,* who may enter a caveat. (Emphasis added.)

[11] Thus notwithstanding the existence of the restriction in interest, after considering the evidence before us and on the authorities cited above, we find that as at the date of entry of the caveat the appellants had obtained an interest of a contractual nature in the property. In other words, they acquired a caveatable interest in the property. We are of the considered view that the appellants have shown that they have a prima facie contractual right of action against the first respondent which is sufficient to support the caveat.

[12] Having found that the appellants' claim as expressed in Form 19B amounts to a caveatable interest, the next question that has to be considered is whether the appellants have shown that on the factual matrix their claim is not frivolous or vexatious and that their claim discloses a serious question that merits a trial. The onus is upon the caveator to satisfy the court that on the evidence presented his claim to an interest in the property does raise a serious question to be tried, and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party (per Lord Diplock in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18). At this stage of the proceedings what is required of the appellants is to show that they have a prima facie case and not that they must ultimately succeed. We are of the considered view that the obligation undertaken by the first respondent under the SPA to apply for consent is a promise *de futuro* to complete the transaction and to enable the appellants to become the registered owners of the property. However the first respondent has rescinded the SPA and shortly after the dismissal of the appellants' application by the High Court the first respondent sold the property to the second respondent who claims that he is a bona fide purchaser. Thus there are competing interests in the property between the appellants and the second respondent. We are of the view that the dispute between the appellants and the first respondent, the remedies if any available to the appellants, the rival claims of the appellants and the second respondent in

respect of the property all merit further consideration by the court hearing the suit filed by the appellants. It is well settled that the onus is on the second respondent, whose title was subsequent to the contract between the first respondent and the appellants, to prove that he is a bona fide purchaser for value without notice. Where there is a dispute between the immediate parties to a sale and purchase transaction, a bona fide purchaser is not necessarily one who has paid the full purchase price. Much will depend upon the particular circumstances of each case (per Edgar Joseph Jr FCJ in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1998] 1 CLJ 793). In *Ong Chat Pang & Anor v Valiappa Chettiar* [1971] 1 MLJ 224; [1971] 1 LNS 96 the Federal Court held that the onus of proof was on the persons claiming by a title subsequent to the contract of sale to show that they were bona fide purchasers for value without notice of the earlier contracts. It is to be remembered that our courts have consistently recognised and give precedence to equitable rights which are prior in time and are not severed by a bona fide purchaser for value without notice (per Abdul Malik Ishak JCA in delivering the majority judgment of the court in *Vellasamy Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN 35553, Lot 9108 Mukim Hutan Melintang, Hilir Perak) v Gurbachan Singh Bagawan Singh & Ors* [2010] 5 MLJ 437; [2012] 2 CLJ 712). At this stage we are of the view that it is premature to determine whether the rights of the appellants arising from their contractual agreement with the first respondent ought to prevail over the subsequent dealing between the first respondent and the second respondent. In the circumstances we are satisfied that the appellant's claim is not frivolous and vexatious and that there are serious questions to be tried.

[13] The next question is whether on the balance of convenience, the caveat should be extended until the disposal of the main action. In our considered opinion notwithstanding the subsequent purchase by the second respondent and his registration as the owner of the property, the balance of convenience merits that the caveat be allowed to remain to prevent further dealing in the property pending determination of the dispute between the parties. On the factual matrix of this case we are of the view that the learned High Court judge ought to have exercised her discretion and allow the appellants' application to extend the caveat. For the reasons stated above we allowed the appeal with costs of RM10,000 here and below against the first respondent and set aside the order of the High Court. No costs was ordered against the second respondent. The deposit was ordered to be refunded.

Appeal allowed with costs of RM10,000 against first respondent.

Reported by Kohila Nesan